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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 2000

No. 00-9280

WILLIAM ARTHUR KELLY,

PETITIONER.

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

On Writ of Writ of Certiorari to the Supreme Court of South Carolina

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REPLY BRIEF FOR PETITIONER

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ARGUMENT IN REPLY

1. The state continues to insist that its emphasis on petitioner's purported future dangerousness in prison did not implicate the rule of Simmons v. South Carolina, 512 U.S. 154 (1994), because a capital murderer's in-prison dangerousness does not also tend to establish his dangerousness in general. Brief in Opposition (hereinafter BIO) at 14-17. Having already discussed this argument, Pet. for Cert. at 13-15, petitioner would add only that the prosecutor's jury argument contains no hint of this gossamer-thin distinction. At trial, the state offered its evidence of petitioner's potentially violent misconduct in jail for whatever significance the jury wished to give it. The prosecutor's jury argument did not suggest that this evidence proved only that petitioner would take hostages and use deadly weapons so long as he was incarcerated, but not afterwards. Although the prosecutor did cite petitioner's prison misconduct to refute the defense claim that he would adapt successfully to prison life, R. 2038-39, in the next breath he was implying that petitioner's behavior in pretrial confinement also demonstrated immutable character traits ("That's just shanks will be shanks. And murderers will be murderers. And he is the cold-blooded one right over there." R. 2040.). In short, the record does not

support the state's counter-intuitive reconstruction of its case at trial, which now seems to be that petitioner would be dangerous only so long as he was imprisoned.

2. Respondent alleges various procedural bars to consideration of some, though not all, of the state's future dangerousness evidence and argument at trial. BIO at 17-20, 23-24. The state also raised most of these procedural arguments in the South Carolina Supreme Court, State v. Kelly, Brief of Respondent at 30-32, 35, 37, but the state court addressed none of them and instead proceeded directly to the merits of petitioner's Simmons claim, holding that "future dangerousness was . . . neither a logical inference from the evidence nor was it injected into the case through the State's closing argument." State v. Kelly, 540 S.E.2d 851, 857 (S.C. 2001). The failure of the South Carolina Supreme Court to base any part of its decision on the procedural bars asserted by the state is not surprising, since the South Carolina courts have never held that a criminal defendant must itemize at trial every single fact in the record alleged to supporting a properly-preserved federal constitutional claim. The state's argument notwithstanding, there is no procedural impediment to this Court's consideration of the entire record in evaluating petitioner's Simmons claim.

3. The state attempts to differentiate this case from Simmons in part by asserting that in Simmons, "expert witnesses from the prosecution stated that Simmons posed a continuing risk to elderly women." BIO at 24. This is incorrect. In Simmons, the only expert witness to opine that Simmons was dangerous was a psychologist called by the defense. Having elicited this admission on cross-examination, the prosecutor then argued to the jury that even Simmons' "own psychologist, Dr. Evans, testified he is dangerous." Simmons v. South Carolina, No. 92-9059, J.A. at 102. In this case, the prosecutor's cross-examination of petitioner's psychologist yielded evidence that petitioner had a history of torturing animals, R. 1958-59, and of "obsessing" about killing people who made him angry. R. 1927. Whatever subtle distinctions may be drawn between these two sets of facts, no intelligible rule of federal constitutional law can apply to one but not the other.

4. Insisting on its right to prove petitioner's past dangerousness without implicating his future dangerousness, the state points out that evidence is often admitted for one purpose but not another. BIO at 27. However, the state overlooks that courts normally ensure the proper use of such evidence by means of limiting instructions. E.g. Dowling v.

United States, 493 U.S. 342, 353 (1990). Here a limiting instruction was requested and denied, and the record provides no reason to doubt that petitioner's jury interpreted the prosecution's evidence and argument as a generalized showing of future dangerousness.

5. The state implies that future dangerousness ought not to be deemed at issue, within the meaning of Simmons, unless the state offers its own expert testimony on the point, submits a formal dangerousness aggravating factor to the jury, or "pound[s] the podium" while telling the jury, "'You must put this person to death or he will kill somebody again in society in the future.'" BIO at 27. None of these examples are to be found in Simmons itself. Indeed, no South Carolina case will ever involve submission of a formal dangerousness aggravating factor, since South Carolina's capital sentencing statute does not include one. Respondent's depiction of "an express future dangerousness case to which the rule in Simmons was aimed" is actually a request to overrule Simmons by limiting it to what would be, in South Carolina at least, a non-existent set of cases.

Despite this Court's recent decision in Shafer v. South Carolina, 121 S.Ct. 1263 (2001), South Carolina's resistance to Simmons continues unabated. Indeed, on the day the present

petition for certiorari was filed, the prosecutor in this case was successfully resisting a Shafer-based motion for a new sentencing hearing in another case by quoting from his own jury argument in Kelly, and pointing to the South Carolina Supreme Court's determination that not even this argument had raised future dangerousness within the meaning of Simmons. State v. Haselden, No. 99-GS-32-3064 (Hearing on New Trial Motion, Lexington, S.C., April 5, 2001) (appeal pending S.C. Sup. Ct.). Unless corrected by this Court, the extremely narrow view of "future dangerousness" announced by the South Carolina Supreme Court in petitioner's case will likely prove as effective in nullifying the due process rule of Simmons for South Carolina capital defendants as was the misinterpretation of the Simmons "life without parole" requirement that the Court corrected in Shafer.

CONCLUSION

For the foregoing reasons and those contained in the petition for writ of certiorari, the writ should be granted.

Respectfully submitted,

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PROOF OF SERVICE

The undersigned attorney hereby certifies that a manuscript copy of the Reply Brief for Petitioner was served upon counsel for the Respondent by mailing one (1) copy properly addressed with postage prepaid this 9TH day of May, 2001, to:

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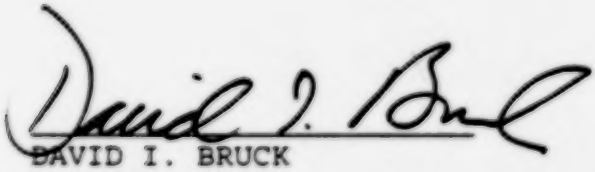

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